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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN JOSEPH VERCHES, Defendant and Appellant.	H041967 (Santa Clara County Super. Ct. No. F1138736)

Defendant Justin Joseph Verches pleaded no contest to importing a large-capacity magazine (Pen. Code, former § 12020, subd. (a)(2))[1] and possession of marijuana (Health & Saf. Code, § 11357, subd. (c)) after the trial court denied several motions to suppress the evidence, as well as a motion for a *Franks* hearing.[2] Law enforcement agents had observed Verches purchasing three large-capacity magazines at an out-of-state gun show. The magazines were legal in the state of purchase but are illegal in California. After confirming a few days later that Verches had returned to California, agents obtained a warrant to search his home, where they discovered contraband.

On appeal, Verches argues that his motion to quash the warrant and suppress evidence should have been granted because the affidavit did not provide probable cause,

[1] Unspecified statutory references are to the Penal Code.

[2] *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*). *Franks* established the process to challenge a warrant upon a preliminary showing by the defendant that the affiant "knowingly and intentionally, or with reckless disregard for the truth" included a false statement in the warrant affidavit. (*Id.* at p. 155.)

nor could a well-trained police officer have reasonably believed that probable cause existed. He also argues that an evidentiary hearing was required based on a substantial showing that the affiant withheld material information from the magistrate tasked with issuing the warrant. We affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. FACTS[3]

On May 21, 2011, a task force of California law enforcement agents, including special agent Bradley Bautista of the California Department of Justice, Bureau of Firearms, surveilled a gun show in Reno, Nevada. Their objective was to identify suspected California residents who entered Nevada to purchase weapons or accessories that would be illegal in California. Agents observed an individual, later identified as Verches, purchase an upper receiver for an assault rifle[4] and three large-capacity automatic rifle magazines capable of holding 30 rounds of ammunition. They also heard Verches ask the vendor if he had a "lower" receiver[5] so he could build an assault rifle. Agent Bautista observed Verches leave the gun show carrying a white plastic bag, which he placed in the rear compartment of a black Mercedes Benz bearing a California license plate. Agent Bautista did not know if the plastic bag contained the items that Verches had purchased. Verches was accompanied by an unidentified man.

Agent Bautista confirmed that the Mercedes was registered to Verches at a residential address in Morgan Hill, California. He observed Verches and the unidentified man drive away in the Mercedes, with Verches in the passenger seat. Agents followed

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[3] The factual summary is based on the affidavit submitted in support of the search warrant and on evidence presented at the preliminary hearing.

[4] An upper receiver is the part of the firearm that usually contains the barrel and attaches to the lower receiver of the rifle. It was not illegal for Verches to bring the upper receiver back to California.

[5] A lower receiver is the part of the firearm that usually contains the trigger and firing mechanism.

Verches in the Mercedes to various stops around Reno, where Verches exited the vehicle for short periods of time, before eventually arriving at a casino-hotel valet parking lot around 6:33 p.m. Agents twice lost sight of the vehicle during the time they were following it. Agents terminated the surveillance after confirming that Verches was a registered guest at the hotel until May 22, 2011, the next day. However, agents placed an electronic tracking device on the Mercedes. Records from the tracking device show that the Mercedes made 15 stops between leaving the gun show and arriving the next day at Verches's house in Morgan Hill.

Agent Bautista conducted a California Automated Firearms System records check that showed Verches did not have any assault rifles registered in his name. He and another agent also made a positive identification of Verches by comparing his DMV photograph with video taken of Verches's purchase at the gun show. Agent Bautista conducted an automated criminal history check and public database search, and later verified Verches's address with the Morgan Hill Police Department. The address matched the registration address for the Mercedes that agents followed from the gun show. On May 24, 2011, Agent Bautista went to the residence and did not see the Mercedes, but observed Verches exiting the house and leaving in another vehicle that was parked in front and registered in his name.

Two days after observing Verches at his house, Agent Bautista obtained a search warrant for unregistered AR-15 type or assault rifles and large-capacity magazines, to be found on Verches's person, in his vehicles, or in his home. The warrant affidavit summarized Agent Bautista's training and experience, including four years as a special agent with the California Department of Justice, Bureau of Firearms and five years with the Bureau of Narcotic Enforcement, preceded by nine years with other federal and state law enforcement agencies. Agent Bautista opined based on his training and experience that people who buy " 'upper receivers,' high capacity magazines and/or other AR type or series parts, generally possess assault weapon(s)" and keep those "illegal guns and

related items, on their person, in their homes, or in any vehicles and or storage buildings that are under their control." The affidavit did not mention the electronic tracking device or the information it had recorded.

Agents executed the search warrant at Verches's house on May 31, 2011. In response to questioning, Verches told Agent Bautista that he was at a gun show in Reno on May 21, 2011 and had purchased "magazines and other parts." Verches provided the combination to the safe in his bedroom. Agents found the following items: a .40-caliber assault rifle pistol-type; 2,454 grams of marijuana mostly packaged in one-pound black plastic bags; large-capacity magazines; shotguns, rifles, accessories, a butterfly knife, a throwing star, and another firearm with a large-capacity magazine; $20,500 in United States currency;[6] and a digital scale.

B. CHARGES

The Santa Clara County District Attorney charged Verches by information filed on May 25, 2012, with importing a large-capacity magazine (former § 12020, subd. (a)(2); count 1), possession of an assault weapon (former § 12280, subd. (b); count 2), possession of marijuana for sale (Health & Saf. Code, § 11359; count 3), and possession of a prohibited weapon, a shuriken (former § 12020, subd. (a)(1); count 4).[7] The district attorney further alleged that Verches was armed with an assault weapon (§ 12022, subd. (a)(2)) and a firearm (§ 12022, subd. (a)(1)) when he possessed the marijuana for sale.

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[6] Agent Alejandro Romero testified that he confiscated $20,550, though Agent Bautista testified that a total of $22,500 was seized.

[7] All references to the weapons charges against Verches are to the former Penal Code sections under which Verches was charged. The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005, 16010.) Effective January 1, 2012, former section 12020, subdivision (a)(2) (count 1) was recodified at section 32310, subdivision (a); former section 12280, subdivision (b) (count 2) was recodified at section 30605, subdivision (a); and former section 12020, subdivision (a)(1) (count 4) was recodified at section 22410 (Stats. 2010, ch. 711 (S.B. 1080), §§ 4, 6).

C. MOTIONS TO SUPPRESS AND FOR A *FRANKS* HEARING

Verches brought several motions to quash the search warrant, traverse the search warrant, and to suppress the evidence pursuant to section 1538.5.

First motion

In a motion filed in January 2012, before the preliminary hearing, Verches asserted that the warrant affidavit showed only that Verches had made a legal purchase in Reno, Nevada, and returned several days later to California. These facts, he argued, were insufficient to show "importation" of large-capacity magazines or establish any nexus between the legal conduct in Nevada and Verches's residence in California. He further argued that Agent Bautista's opinion, though based on training and experience, offered nothing more than suspicion and speculation. The prosecutor responded that the totality of the circumstances and opinion of the affiant provided a substantial basis for the probable cause finding.

At the hearing, the trial court denied the motion while describing it as "a close case." The court found the essential facts were uncontested: Verches was a California resident who purchased large-capacity magazines and an upper receiver while at a gun show in Reno, and returned to California within two or three days. The court acknowledged the surveillance "didn't go as the officers hoped it would, in that they did not directly follow the defendant back from Nevada . . . ." but reasoned that "I don't think delay of two or three days where they lost track, if you will, of the items defeats the general notion that people who purchase these things often keep them at home." In contrast with cases concerning drugs or drug users, the court noted that "magazines and firearms are durable items that last for many decades if properly maintained." The court concluded that there was a substantial basis for upholding the warrant and found that even if it lacked probable cause, the good faith exception to the warrant requirement would apply.

Second motion

Verches, represented by new counsel and following the preliminary hearing on May 14, 2012, renewed in September 2012 his arguments from the first motion to quash the search warrant "based on a facial lack of probable cause to the warrant affidavit." Verches also moved to traverse the search warrant based on material omissions and for a hearing pursuant to *Franks, supra*, 438 U.S. 154. He argued, based on Agent Bautista's preliminary hearing testimony, that the affiant deliberately or with reckless disregard omitted from his affidavit material information about agents' placement of the electronic tracking device on the Mercedes—conduct that Agent Bautista testified was "not [illegal] at that time."[8]

Verches claimed the omitted information negated any "nexus" between the alleged crime and the particular place to be searched, given numerous stops between the gun show and the address on the search warrant. He contended the omissions must have been deliberate or in reckless disregard, because their disclosure would have led the magistrate to conclude that multiple addresses could have received the large-capacity magazines, including another address in Morgan Hill, and because the affiant knew that placing the tracking device on the Mercedes without a warrant was of questionable legality.

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[8] At the preliminary hearing on May 14, 2012, defense counsel questioned Agent Bautista about how agents knew that Verches had returned to California: "[Agent Bautista]: We had placed a electronic device on his vehicle. [¶] [Defense Counsel]: Did you have a warrant to do that? [¶] [Agent Bautista]: No. [¶] [Defense Counsel]: So that was illegal then; wasn't it? [¶] [Agent Bautista]: No, not at that time."

The parties agree that this colloquy was referring to *United States v. Jones* (2012) 565 U.S. 400, which the United States Supreme Court decided on January 23, 2012. The court held that the government's attachment of an electronic tracking device to an individual's car in order to monitor the car's movements on public streets constituted a search under the Fourth Amendment, and the admission of evidence obtained by warrantless use of the tracking device was properly suppressed. (*Id.* at pp. 402, 411-412.)

The trial court denied the second motion to quash and suppress evidence, motion to traverse, and request for a *Franks* hearing. On the motion to traverse, the court found that the defense had not shown any "malicious omission." The court explained, "I think it is a reasonable step for officers to take that if they believe that the evidence may be unlawful for the magistrate to consider, to not submit it to the magistrate." The court found that even it had been considered, evidence that Verches "stopped somewhere for a few minutes before going home" would not have altered "a reasonable magistrate's consideration of the totality of the probable cause." The court repeated its reasoning from the first hearing, that "if a California resident purchases an item legal in another state that is illegal to purchase in this state, the kind of people who buy such a thing one might have at homes as opposed to a workplace . . . , their home is a reasonable place to look for it." The court denied the motion to traverse the search warrant.

Third motion to suppress and motions to dismiss

In February 2013, following another change in counsel, Verches filed a third motion to quash the search warrant, traverse the search warrant, and suppress evidence. Verches asserted that the judge who heard the motions to suppress lacked jurisdiction to hear the first motion on statutory grounds,[9] and that the same judge acted in excess of his authority by "sit[ting] in review of his own ruling" when he presided over the second motion to suppress evidence. Verches argued that because the judge lacked jurisdiction over the first motion and had no authority to review his own decision, Verches remained

[9] Verches argued that statutory provisions precluded the trial court from hearing the first motion to suppress, which was filed and argued several months before the preliminary hearing (cf. § 1538.5, subd. (f)(1) [motion to suppress evidence related to a felony offense "shall be made only upon filing of an information, except that the defendant may make the motion at the preliminary hearing . . . ."]) and was not heard by the magistrate who issued the search warrant (cf. § 1538.5, subd. (b) [motion to suppress "should first be heard by the magistrate who issued the search warrant if there is a warrant"]).

entitled to "fully litigate the validity" of the search warrant. The prosecution opposed the motion, arguing the trial judge had fundamental subject matter jurisdiction over the case at all times and defense counsel had waived any objections to timing or procedural errors.

One month later, Verches moved to dismiss the case pursuant to section 995 and on "non-statutory grounds." He asserted that errors in the trial court's handling of Verches's motions to quash, traverse, and suppress evidence, deprived him of certain substantial rights, requiring dismissal.

At a hearing on May 9, 2013, the trial court denied both motions.[10] The court stated that it was "hard-pressed" to see how Verches was denied any substantial right despite procedural irregularities: "[i]t appears to the Court that Mr. Verches has had his two appropriate bites of the apple by way of motion to suppress, the pre-Information and the post Information, and I think, by implication, to the extent that you're asking for a third bite or another suppression motion based on invalidity of the first and/or second, the Court is prepared to deny that request . . . ."

In December 2013, Verches filed another motion to dismiss the case, citing jurisdictional defects and "outrageous government conduct," including the out-of-state surveillance, warrantless placement of the tracking device, and omissions in the police reports and warrant affidavit about the tracking device. At a hearing on March 14, 2014, the court found that none of the acts relied on by the defense constituted misconduct. The court explained that attaching the tracking device was "not clearly illegal at the time," nor were the officers "engaged in the kind of official acts that jurisdiction requires when they conduct a surveillance or even when they attach a tracking device that is not subsequently used during the course of the prosecution."

[10] These proceedings occurred before a different judge than the judge who presided over the first and second motions to suppress evidence.

D. PROCEEDINGS AFTER DENIAL OF THE MOTIONS TO SUPPRESS

Verches pleaded no contest to importing a large-capacity magazine (former § 12020, subd. (a)(2); count 1) and to misdemeanor marijuana possession, a lesser included offense of count 3 that was added by amendment to the complaint (Health & Saf. Code, § 11357, subd. (c); count 5). Pursuant to the plea agreement, on December 15, 2014, the trial court suspended imposition of sentence and placed Verches on three years of formal felony probation conditioned on him serving 30 days in county jail, as to count 1 only, with credit for time served. The court dismissed counts 2, 3, and 4 and imposed other probation conditions, restitution, fines, and fees.

II. DISCUSSION

We first consider whether probable cause existed for issuance of the warrant on the face of the affidavit. If there was no probable cause, we look to whether the agents nonetheless acted reasonably and in good faith (*United States v. Leon* (1984) 468 U.S. 897 (*Leon*)), or whether omissions from the warrant affidavit precluded application of the good faith exception and required an evidentiary hearing under *Franks*. Verches does not renew his jurisdictional arguments or appeal the denial of his motions to dismiss.

A. MOTION TO QUASH THE SEARCH WARRANT

Verches renews his argument that issuance of the search warrant contravened the fundamental requirement that probable cause exist for the particular location subject to search. He contends the affidavit established only (1) that he made a legal purchase in Nevada, and (2) appeared at home in California three days later, driving a different car than was seen in Nevada. We find, however, that the facts recited in the affidavit support more than this minimalist picture of purely legal conduct in another state and were sufficient for issuance of the warrant.

Probable Cause

A magistrate may issue a search warrant upon a showing of probable cause, supported by affidavit. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13; § 1525.)

Probable cause means " 'a fair probability that contraband or evidence of a crime will be found' " at the place to be searched. (*United States v. Sokolow* (1989) 490 U.S. 1, 7; *Illinois v. Gates* (1983) 462 U.S. 213, 238, 243, fn. 13 (*Gates*).) The magistrate's determination of probable cause is based on a "practical, commonsense" assessment of the totality of facts set forth in the affidavit. (*Gates*, *supra*, at p. 238.) While a magistrate may consider the opinions of an experienced officer in making the probable cause determination, "an affidavit based on mere suspicion or belief, or stating a conclusion with no supporting facts, is wholly insufficient." (*People v. Garcia* (2003) 111 Cal.App.4th 715, 721 (*Garcia*); *Gates*, *supra*, at p. 239.)

In accordance with these principles, an appellate court reviewing the validity of a search warrant " 'inquires "whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 483 (*Scott*).) The magistrate's determination of probable cause is entitled to deferential review (*ibid*.), and "[d]oubtful or marginal cases are resolved in favor of upholding the warrant." (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278, citing *United States v. Ventresca* (1965) 380 U.S. 102, 109.) "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." (*Gates*, *supra*, 462 U.S. at p. 236.)

Validity of the Search Warrant

We agree with Verches that as a general principle, engaging in lawful conduct in another state does not, without more, provide officials with probable cause to search a person's California home. The affidavit submitted in support of a search warrant "must establish a nexus between the criminal activities and the place to be searched." (*Garcia*, *supra*, 111 Cal.App.4th at p. 721.) Even evidence of underlying criminal conduct, as a

standalone fact, will rarely convey probable cause to search a suspect's residence.[11] But courts may look to other factors to provide a nexus between the place to be searched and the objects being sought.

As stated by the California Supreme Court: "Mere evidence of a suspect's guilt provides no cause to search his residence. [Citation.] However, '[a] number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items.' " (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) The Ninth Circuit Court of Appeals similarly has expounded on "the propriety of issuing search warrants for a suspect's residence based only upon probable cause that the suspect was guilty of the underlying crime." (*United States v. Hendricks* (9th Cir. 1984) 743 F.2d 653, 655 (*Hendricks*).) The court explained, " '[I]t cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence.' . . . [¶] . . . To establish the nexus between the place and the objects sought, the court may look to 'the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely' " to conceal the items sought. (*Ibid.*, quoting *United States v. Lucarz* (9th Cir. 1970) 430 F.2d 1051, 1055.)

Our high court applied this principle in *People v. Carrington* (2009) 47 Cal.4th 145 (*Carrington*). The pertinent issue in *Carrington* was whether an affidavit describing police investigation of two commercial burglaries of stolen blank checks provided probable cause for issuance of a warrant to search the defendant's home. (*Id.* at p. 161.) After ascertaining that the affidavit provided probable cause to support the belief that the

[11] One exception that we discuss in more detail below is the class of cases involving drug trafficking or drug dealers.

defendant had committed the burglaries (*id*. at p. 162), the court noted several facts that "established a fair probability that the police would find evidence from the burglaries in defendant's residence," including that the defendant had at one time possessed a key to one of the burglarized locations, could have made a copy of that key, and that several of the stolen checks were still outstanding at the time of the search. (*Id*. at p. 163.) The court explained: "As the affiant observed based upon his training and experience, 'subjects who steal checks with the intent to commit forgeries will maintain possession of those stolen checks until they can be cashed.' It was reasonable to conclude that defendant's residence was the most likely place to find these items." (*Ibid*.)

In the case at bar, Agent Bautista's affidavit contained information that was arguably analogous to that found to be sufficient in *Carrington*. His affidavit stated in relevant part: "[I]t is your affiant's opinion, based upon your affiant's training and experience, that Justin VERCHES . . . is in possession of assault rifle(s) and high capacity magazines. Based upon my training and experience, **those who purchase 'upper receivers,' high capacity magazines and/or other AR type or series parts, generally possess assault weapon(s)**. It is your affiant's opinion that VERCHES . . . has the referenced firearm and magazines in his possession . . . [and] is storing those firearm(s) and large-capacity magazines at his residence . . . . [¶] Based on my training and experience, I know that **illegal firearm** traffickers and **purchasers commonly keep guns on hand for immediate access. They keep their stolen and otherwise illegal guns and related items, on their person, in their homes, or in any vehicles and or storage buildings that are under their control**. I know that persons who illegally receive and sell firearms frequently possess illegal firearms for protection and for resale." (Emphasis added.)

Agent Bautista's observations, based on several years of training and experience, were not merely conclusory (cf. *Gates*, *supra*, 462 U.S. at p. 239 [illustrating " 'bare bones' " affidavits that failed to provide the magistrate with sufficient information]).

They were tied to several other facts in the affidavit. Verches purchased three large-capacity magazines and an upper-receiver from the vendor at the gun show and asked the vendor if he could buy a lower-receiver so he could build an assault rifle. Although it was not illegal for Verches to buy the high-capacity magazines and upper-receiver while at the show in Reno, the inference that emerges—especially given his inquiry about a lower-receiver (which evidently would have been illegal in both Nevada and California) was that Verches's objective, while in Nevada, was to get parts for an assault rifle. Agents did not stop the investigation there but went on to verify several key pieces of information, including Verches's identity as the person who purchased the magazines and upper receiver, his home address in Morgan Hill, the matching registration address of the car that Verches and his companion entered upon leaving the gun show with what reasonably could be inferred were Verches's purchases in the white plastic bag, and Verches's return to his Morgan Hill residence a few days later. Agent Bautista also verified through the state's database that Verches did not have any assault rifles registered in his name, raising further suspicion about his purchase of the large-capacity magazines, upper receiver, and pursuit of a lower receiver.

Verches maintains that these facts and inferences amount to nothing more than evidence of his legal purchase in Nevada and subsequent return to California. This argument fails to acknowledge the nature of the suspected crimes—possession of an assault weapon and importation of large-capacity magazines—and the items sought in the warrant. (See *Carrington*, *supra*, 47 Cal.4th at p. 163 [" ' "from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items" ' "].) The trial court described the items subject to the warrant as "durable items that last for many decades if properly maintained." Indeed, the "assault rifle(s) and high capacity magazines" sought in the warrant are items that are not casually disposed of and, moreover, are often closely

associated with personal protection and the home. Court decisions discussing search warrants for firearms appear to be in consensus on this point.

For example, in *People v. Lee* (2015) 242 Cal.App.4th 161 (*Lee*), the appellate court reversed the grant of a motion to quash even though the affidavit supporting the warrant failed to inform the magistrate that the items being sought—two guns which were registered to the defendant—had been registered almost 17 years earlier, while the defendant was living at a different address. (*Id*. at pp. 169-170.) The court explained the "salient point" (*id*. at p. 172) was that the guns remained registered to a person whose possession of them would constitute a felony, and "it is no great leap to infer that the most likely place to keep a firearm is in one's home." (*Id*. at p. 173.) Other examples include *United States v. Bowers* (9th Cir. 1976) 534 F.2d 186, 192 ("objects were of a kind (guns, ammunitions, archery equipment, clothes) likely to be found where the persons involved lived") and *U.S. v. Maxim* (8th Cir. 1995) 55 F.3d 394, 397 (probable cause for issuance of warrant existed despite time lapse, since "survivalists and other firearm enthusiasts . . . tended to hold onto their firearms for long periods of time—often as long as ten or twenty years"). Indeed, in *Carrington*, the California Supreme Court made a similar observation about an object as innocuous as a copied key. (*Carrington, supra*, 47 Cal.4th at p. 163 ["A key is the type of item one reasonably could expect a defendant to keep at home."].)

The cases that *Verches* relies on do not dictate a different outcome. In *People v. Pressey* (2002) 102 Cal.App.4th 1178 (*Pressey*), the appellate court rejected the proposition that "probable cause to believe that a person uses illegal drugs *automatically* provides probable cause for a warrant to search the person's home for those drugs." (*Id*. at p. 1181, italics added.) In doing so, the court distinguished cases involving evidence of drug dealing as opposed to drug use. Whereas California and most federal court decisions concerning drug dealers have upheld probable cause findings based on an inference that " ' " 'evidence [of drug dealing] is likely to be found where the dealers

live' " ' " (*id*. at p. 1184), no California case had decided if evidence of drug use, by itself, could furnish probable cause to search a residence. (*Id*. at p. 1185.) The *Pressey* court declined to adopt such a rule in drug use cases because, among other reasons, "an inference of contraband in the home is more speculative in the case of drug users than drug traffickers," and such a rule "would potentially open the door to a vast number of residential intrusions" without justification under the reasonableness considerations imposed by the Fourth Amendment. (*Id*. at p. 1189.) Since "there may be some reason to suspect that 'everyone engaged in criminal activity (drugs or otherwise), keeps evidence of the criminal activity at home' (*State v. Ward* (2000) 231 Wis.2d 723 (dis. opn. of Abrahamson, C. J.))," the court determined that application of that generalization in the context of simple drug possession or use would " 'swallow' " the rule. (*Pressey*, *supra*, at p. 1190.)

We believe the court's analysis in *Pressey* is not inconsistent with our conclusion here. The nature of the suspected crimes and evidence sought by the warrant in this case are not comparable to the drug offense or drug evidence addressed in *Pressey*, and the investigative efforts reported in the affidavit were far more extensive. The magistrate's probable cause finding was not dependent only on "opinion or inference, available in every case" (*Pressey*, *supra*, 102 Cal.App.4th at p. 1190), but on the combination of facts and inferences discussed above that came from agents' observations of Verches and the type of contraband at issue.

Verches also relies on *Hendricks*, *supra*, 743 F.2d 653. But the lack of probable cause to support issuance of the search warrant in *Hendricks* stemmed from a disconnect between the known location of the drugs and the location to be searched. A box, containing cocaine, had arrived from abroad and was addressed to a residence in Tucson, Arizona, though the shipping method required the recipient to pick up the box. (*Ibid*.) Drug enforcement agents held the box in Tucson and gathered information about the intended recipient, whose home address matched the address on the box. A warrant

issued for a search of the home, with the caveat that " 'this search warrant is to be executed only upon the condition that the above described box *is brought to* the aforesaid premises . . . .' " (*Id*. at p. 654.) The Ninth Circuit found there was no probable cause because "at the time the warrant was issued, the magistrate *knew* the suitcase was in the possession of the agents, not at the house," and there was no certainty that the box "would ever be brought there." (*Ibid*.) The magistrate who issued the search warrant essentially "abdicate[d] to the [drug enforcement] agents an important judicial function—the determination that probable cause exists to believe that the objects are currently in the place to be searched." (*Id*. at p. 655.) The court concluded there was no "sufficient nexus between the box and the residence." (*Ibid*.)

The temporal and spatial gaps that undermined probable cause in *Hendricks* are not replicated here. Agents observed Verches's purchases at the gun show on May 21, 2011, confirmed that he was registered to stay in Nevada until at least the following day, and verified through surveillance at his Morgan Hill house on May 24, 2011, that he had returned to California.

We conclude that the sum of the circumstances recited in the affidavit supplied a reasonable basis for the magistrate to believe that having bought the upper receiver and magazines at the gun show only a few days earlier, and having demonstrated an interest in acquiring additional assault rifle parts, there was a fair probability that Verches brought the items to his home for safekeeping or protection. No doubt there were other conceivable inferences that could have been made about whether Verches, for example, left the upper receiver and magazines with his unknown companion while still in Nevada. But "[t]he fact that there may be more than one reasonable inference to be drawn does not defeat the issuing magistrate's finding of probable cause." (*People v. Stanley* (1999) 72 Cal.App.4th 1547, 1555.) The search warrant in this case was facially valid.

Good Faith Exception

The trial court found at both hearings on the motion to quash the search warrant that even if the warrant was invalid for lack of probable cause, the good faith exception to the warrant requirement would apply. Verches contends this was error because no reasonable officer viewing the affidavit in this case would have believed it to be sufficient. Having concluded that the warrant was supported by probable cause, we need not resolve the question of good faith. We proceed only in order to address a point that Verches raises about the absence of pertinent case authority.

Whether evidence must be excluded if it is seized pursuant to a warrant unsupported by probable cause depends in relevant part on whether the search was conducted "in objectively reasonable reliance on a subsequently invalidated search warrant." (*Leon, supra*, 468 U.S. at p. 922.) "If a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant), exclusion is required." (*People v. Camarella* (1991) 54 Cal.3d 592, 596 (*Camarella*).)

Verches points to the uniqueness of the search in this case, and relatedly the lack of any on-point authority or close analogue in case law, in support of his argument that a well-trained officer could not reasonably believe the facts contained in the affidavit were sufficient. He argues that it was not objectively reasonable, nor even a "debatable" question, whether probable cause existed.

We are not persuaded by this logic. The paucity of case authority does not signal, in and of itself, that "a close or debatable question on the issue of probable cause" (*Camarella, supra*, 54 Cal.3d at p. 606) is not present. More pertinent is the extent of the investigation and any corroborating information reflected in the affidavit, and whether these would prove " 'sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause.' " (*Ibid*., quoting *Leon, supra*, 468 U.S. at p. 926.) The degree to which such disagreement might arise, of course, depends on case

law, which might foreclose a finding of good faith (see *U.S. v. McGrew* (9th Cir. 1997) 122 F.3d 847, 850, fn. 5 [good faith exception is not available where the relevant question "has been the clear law of this circuit for over a decade, foreclosing any 'reasonable belief' to the contrary"]), just as it might add support (see *Pressey*, *supra*, 102 Cal.App.4th at p. 1191 [good faith exception applied where there was a "dearth of authority directly on point" but there existed "potentially supportive precedent" on a related issue]).

Verches has not identified any case law that would have foreclosed a finding of probable cause. To the contrary, as demonstrated above, existing legal authority provided that in some circumstances, a magistrate can consider the nature of the criminal activity and type of evidence sought in deciding if the required nexus between the suspected criminal conduct and the search location has been established. The fact that the parties have not identified any factually analogous case to the circumstances presented here is therefore not determinative of whether the question was "close or debatable." It must be noted, however, that other circumstances remain relevant to the question of an officer's "objectively reasonable" reliance on the issuance of a search warrant, including "if the officers were dishonest or reckless in preparing their affidavit . . . ." (*Leon*, *supra*, 468 U.S. at p. 926.) Accordingly, we turn to that issue.

B. MOTION TO TRAVERSE THE SEARCH WARRANT AND FOR A *FRANKS* HEARING

Verches asserts that the trial court erred in denying his motion to traverse the warrant without an evidentiary hearing under *Franks*, *supra*, 438 U.S. 154. He argues that the trial court improperly employed a heightened standard in deciding the motion, and that evidence of Agent Bautista's deliberate omissions of information from the search warrant affidavit satisfied the standard for a *Franks* hearing. The People respond that Verches failed to make the required showing.

Under *Franks*, "A defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. The trial court must conduct an evidentiary hearing only if a defendant makes a substantial showing that (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause." (*Scott, supra*, 52 Cal.4th at p. 484, citing *Franks, supra*, 438 U.S. at pp. 154-156.)

A defendant similarly "can challenge a search warrant by showing that the affiant deliberately or recklessly omitted material facts that negate probable cause when added to the affidavit." (*People v. Eubanks* (2011) 53 Cal.4th 110, 136.) Omissions are material if they render the affidavit " '*substantially misleading*,' " that is, " 'if, because of their inherent probative force, there is a substantial possibility [the omitted facts] would have altered a reasonable magistrate's probable cause determination.' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 410 (*Sandoval*), quoting *People v. Kurland* (1980) 28 Cal.3d 376, 385; see also *Lee, supra*, 242 Cal.App.4th at pp. 171-172.) Thus, "[a] defendant who challenges a search warrant based on *omissions* in the affidavit bears the burden of showing an intentional or reckless omission of material information that, when added to the affidavit, renders it insufficient to support a finding of probable cause." (*Scott, supra*, 52 Cal.4th at p. 484.)

The "substantial showing" required for a *Franks* hearing poses a high threshold. (*People v. Estrada* (2003) 105 Cal.App.4th 783, 790 ["Because of the difficulty of meeting the 'substantial preliminary showing' standard, *Franks* hearings are rarely held."].) The defendant must overcome "a presumption of validity with respect to the affidavit supporting the search warrant" by "allegations of deliberate falsehood or of reckless disregard for the truth, . . . accompanied by an offer of proof." (*Franks, supra*, 438 U.S. at p. 171.) And "[a]ffidavits or sworn or otherwise reliable statements of

witnesses should be furnished, or their absence satisfactorily explained." (*Ibid*.) Further, as the Court of Appeal noted in *Lee*, "when the allegedly false representations are set aside—or, in this case, when the omitted information is included—'if . . . there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.' " (*Lee, supra,* 242 Cal.App.4th at p. 172, quoting *Franks, supra,* at pp. 171-172.) Appellate review of the denial of a *Franks* hearing is de novo. (*Sandoval, supra,* 62 Cal.4th at p. 410.)

In his motion, Verches cited three facts that defense counsel elicited from Agent Bautista during the preliminary hearing but were omitted from the search warrant affidavit. These were (1) that agents placed an electronic tracking device on the Mercedes while it was in Reno, (2) the records from the tracking device show the Mercedes made 15 stops before arriving at Verches's home, including 13 stops before crossing the border and one stop at another address in Morgan Hill, and (3) the Mercedes was not seen at Verches's house when agents observed him there after his return from Nevada. Although Verches takes issue with the trial court's oral statement at the hearing on the motion to traverse that "I don't think the officer maliciously omitted" the information about the tracking device, we review the trial court's ruling de novo and are not bound by the trial court's reasoning.

We find that even assuming Verches's offer of proof based on Agent Bautista's preliminary hearing testimony met the standard for a "substantial showing" of "an intentional or reckless omission of material information," when added to the affidavit, the information did not render it "insufficient to support a finding of probable cause." (*Scott, supra,* 52 Cal.4th at p. 484.) We analyze each omission separately.

First, the agents placed the electronic tracking device on the Mercedes on May 21, 2011. Agent Bautista testified that the action was "not [illegal] at that time." Indeed, the Supreme Court granted certiorari in *Jones, supra,* 565 U.S. 400, shortly after agents' installation of the tracking device on the Mercedes and after Agent Bautista applied for

the search warrant, and issued its decision before the preliminary hearing in this case, which was held on May 14, 2012.[12] Before that, "California state courts and the Ninth Circuit had held that installation of a GPS device by law enforcement authorities was not a search governed by the Fourth Amendment because a vehicle operator had no reasonable expectation of privacy in a vehicle's exterior." (*People v. Mackey* (2015) 233 Cal.App.4th 32, 95.) Given this timing, the fact that agents acted without a warrant in placing the electronic tracking device on the Mercedes does not undermine the probable cause determination. (See *id*. at p. 43 ["Because California case law allowed warrantless placement of a GPS device by law enforcement at the time the device was placed, the fact that the United States Supreme Court has since held such conduct requires a warrant does not dictate exclusion of the tracking evidence in this case."].)

Next, the data from the tracking device would have shown the Mercedes stopping at several locations in Reno, after agents terminated direct surveillance on the evening of May 21, 2011, and returning to California the next day, making two stops in Reno, one stop in Auburn, California, and one other stop in Morgan Hill. Verches maintains that this information would have foreclosed any possible nexus between Verches's purchases at the gun show and his house. He contends the data from the tracking device would have caused the magistrate to question what distinguished Verches's home, as the site of the proposed search, from the 15 other places that the Mercedes stopped after leaving the gun show.

We find that the number of stops in Reno and on the way to Verches's house was not material to the probable cause determination. The affidavit on its face did not suggest

[12] The United States Supreme Court granted the petition for writ of certiorari on June 27, 2011, directing the parties to address "[w]hether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." (*United States v. Jones* (2011) 564 U.S. 1036.) The court issued its decision on January 23, 2012 (*Jones*, *supra*, 565 U.S. 400)—about eight months after the preliminary hearing in the present case.

that Verches's return to his home in California was immediate or direct, nor would the magistrate have had any reasonable basis to infer a return without stops. Rather, as indicated by the affidavit, during the time that agents followed Verches and his companion in the Mercedes, they made several stops and agents twice lost track of the vehicle. The affidavit then indicated a gap of two days between when agents terminated surveillance in Reno and observed Verches at home in Morgan Hill. Verches theoretically could have dispensed with the large-capacity magazines in any number of ways during that time, including while still in Reno. As discussed above in relation to the motion to quash, the nexus between the suspected criminal conduct and Verches's house arose not from any inference that Verches made a beeline home from the gun show in Reno, but from the nature of Verches's purchases at the gun show, his interest in buying another part to build an assault rifle, his return home within a day or two, and the magistrate's ability to draw reasonable conclusions from the totality of that information and the agent's experienced opinion.

Under these circumstances, there was little " 'inherent probative force' " in the additional stops nor a " 'substantial possibility' " that inclusion of that information in the affidavit " 'would have altered a reasonable magistrate's probable cause determination.' " (*Sandoval*, *supra*, 62 Cal.4th at p. 410; see also *Lee*, *supra*, 242 Cal.App.4th at p. 173 [finding "no substantial possibility that a reasonable magistrate would have altered the probable cause determination" in the absence of "any evidence" that the defendant no longer possessed the guns at his residence "and in light of the evidence that they remained registered" to him].) The purported omission about the black Mercedes not being seen at Verches's house in Morgan Hill does not alter our conclusion, because the affidavit already contained that information.[13]

[13] In the affidavit, Agent Bautista described three cars that were parked in the driveway during his observation of Verches's house, none of which was a Mercedes.

We conclude that the trial court did not err when it found that even if the omitted evidence had been included in the affidavit, it would not have altered "a reasonable magistrate's consideration of the totality of the probable cause." A hearing pursuant to *Franks* was not required.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Walsh, J.[*]

[*] Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.